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Supreme Court of the United States

October Term, 1964

No. [redacted] 91

ELSIE C. WIPER, Executrix of the Estate of
JOSEPH W. WIPER, deceased,

Petitioner,

against

GREAT LAKES ENGINEERING WORKS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GOLDSTEIN & STERENFELD,
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32 Broadway,
New York, New York, 10004.

HARVEY GOLDSTEIN,
on the Petition.

TABLE OF CONTENTS

	PAGE
Opinions of the Courts Below	1
Jurisdiction	2
Questions Presented	2
Statutes Invoked	2
Statement of Facts	3
Reasons for Granting the Writ	4
Conclusion	8
APPENDIX:	
Opinion of United States District Court, Eastern District of Michigan, Southern Division	9
Opinion of United States Court of Appeals for the Sixth Circuit	12
Judgment of United States District Court, Eastern District of Michigan, Southern Division	19
Judgment of Affirmance of United States Court of Appeals for the Sixth Circuit	20

Cases Cited

Aguilar v. Standard, 318 U. S. 724	4
Braen v. Pfeifer, 361 U. S. 129	4, 5
Calbeck v. Travelers, 370 U. S. 114	5, 7

PAGE

Gutierrez v. Waterman, 373 U. S. 206 5

Interlake v. Nielsen, 378 F. 2d 879 ..... 6, 7

Kermarec v. Compagnie, 358 U. S. 625 5

Kyriakos v. Goulandris, 151 F. 2d 132 5

Marceau v. Great Lakes, 146 F. 2d 416 5

Massa v. Venezuelan, 298 F. 2d 239 5

McDonough v. Buckeye, 103 F. Supp. 473, aff'd 200 F. 2d 558 4

McKie v. Diamond, 204 F. 2d 132 5

O'Donnell v. Great Lakes, 318 U. S. 36 ..... 4, 5

Seas v. Sieracki, 328 U. S. 85 7

Senko v. La Crosse, 352 U. S. 370 ..... 4, 5

Strika v. Netherlands, 185 F. 2d 555 5

Warren v. United States, 340 U. S. 523 5

Wiper v. Erie, 293 F. 2d 491 4

Statutes Cited

28 U. S. C. § 1254(1) 2

33 U. S. C. § 901, et seq. 5

46 U. S. C. § 688 4

46 U. S. C. § 740 4

Supreme Court of the United States

October Term, 1964

No.

ELSIE C. WIPER, Executrix of the Estate of JOSEPH W. WIPER, deceased,

Petitioner,

against

GREAT LAKES ENGINEERING WORKS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associated Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled matter on January 29, 1965.

Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, Honorable Fred W. Kaess, unreported to date, is set out in the appendix to this petition at pages 9-11.

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court, reported at 340 F. 2d 727, is set out in the appendix to this petition at pages 12-18.

Jurisdiction

This action, arising out of a maritime tort and within the Admiralty and Maritime jurisdiction, was brought in the United States District Court for the Eastern District of Michigan, Southern Division, on the Civil side of the Court, predicated upon diversity of citizenship and jurisdictional amount.

The decision of the District Court and judgment entered thereon, dismissing the cause was appealed from by the Petitioner.

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court was filed and judgment was entered thereon on January 29, 1965.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U. S. C. § 1254 (1).

Questions Presented

Whether a seaman ordered ashore by his superior to obtain ship's equipment and suffering an accident causing his death while ashore during the course of his employment would have such status as to invoke maritime jurisdiction and the protection of the general maritime law for damage caused on land by maritime events?

Whether uniformity of admiralty and maritime jurisdiction permits different jurisdictional limits for harbor workers and seamen, thus under similar fact patterns permitting harbor workers to invoke maritime jurisdiction while denying that right to seamen?

Statutes Invoked

There are no statutes involved herein.

Statement of Facts

Joseph Wiper was employed as a Chief Engineer aboard a dredge. On September 15, 1958, the vessel was in Respondent's repair yard due to engine difficulty, and was moored at a particular slip under Respondent's instructions. Midship and aft ladders were set out from ship to dock.

Repair of the vessel's shaft was undertaken by Respondent under direction of its master mechanic, assisted by the ship's engineer, including Wiper. An oil seal, part of the ship's shaft had been taken from the vessel to Respondent's repair shop, located on its dock some 1000-1500 yards away from the ship.

At 8 o'clock that night when the part had not been returned, Wiper was awakened with orders from Respondent's mechanic to go to the shop for the part. He dressed and went from the ship onto the dock and was seen by the ship's captain and other crewmen making his way along the dock area heading for the shop.

When he failed to return a search was instituted for him aboard the ship later that night and again the following morning before the ship sailed, without success. His body was found in the slip four days later, his death caused by drowning.

Testimony concerning the condition of the dock was that it was all broken up, dug out, no facing, mud and stone, grass and weeds, deteriorated, in two inches of water, muddy and rocky ground, and without lights, the Respondent having the duty to furnish adequate lighting and a safe place to work.

Suit was commenced against Erie Sand Steamship Co., owner of the vessel in the United States District Court for the Western District of New York, resulting in a jury verdict in favor of the defendant. On appeal, the United

States Court of Appeals for the Second Circuit affirmed the judgment, 293 F. 2d 491.

Suit was timely instituted against the present Respondent in the United States District Court in Detroit. A motion for summary judgment was granted, the decision resting upon a restrictive doctrine of causal relation under Michigan law, while conceding that the more liberal view under maritime law principles might well have resulted in denial of the motion.

On appeal to the Court of Appeals, affirmation of the dismissal was based upon the applicability of Michigan law and rejection of any jurisdictional concept under the general maritime law.

The decision was predicated upon the Court's ruling that locale of the commission of the tortious act was the sole test in determining jurisdiction and that there was a difference between seamen and longshoremen claiming compensation under the federal system, the latter coming within a class of persons having broader rights under Admiralty and Maritime jurisdiction than seamen.

Reasons for Granting the Writ

The decision of the Court below was unduly restrictive in determining that the sole test of maritime jurisdiction rested upon the locale of the tortious act, rejecting legislative and recent judicial effort to expand the scope of that jurisdiction in suits arising out of tortious conduct occurring during the course of employment in pursuance of ship's business, whether aboard the vessel or shoreside, grounded either upon the Jones Act, 46 U. S. C. § 688, or under the general maritime law. Admiralty Extension Act of 1948, 46 U. S. C. § 740; for Jones Act cases: *O'Donnell* v. *Great Lakes*, 318 U. S. 36; *Senko* v. *La Crosse*, 352 U. S. 370; *Braen* v. *Pfeifer*, 361 U. S. 129; *McDonough* v. *Buckeye*, 103 F. Supp. 473, aff'd 200 F. 2d 558 (6C); *Marceau* v. *Great*

Lakes, 146 F. 2d 416 (2C); *Kyriakos* v. *Goulandris*, 151 F. 2d 132 (2C); *McKie* v. *Diamond*, 204 F. 2d 132 (5C); and under the general maritime law: *Gutierrez* v. *Waterman*, 373 U. S. 206; *Aguilar* v. *Standard*, 318 U. S. 724; *Warren* v. *United States*, 340 U. S. 523; *Strika* v. *Netherlands*, 185 F. 2d 555 (2C); *Massa* v. *Venezuelan*, 298 F. 2d 239 (2C).

Wiper was a seaman and officer on the vessel, in its service and aiding in its navigation during a repair operation, similar to the situation in *O'Donnell* v. *Great Lakes*, 318 U. S. 36. Moreover, he was aiding the Respondent and was in the course of his employment in obeying the instructions of its employees in going onto the dock to the machine shop to obtain the oil seal in furthering the Respondent's contractual obligation to repair the vessel's propulsion system. As such, there was a status created between the Respondent and the deceased, carrying with that relationship mutual duties and benefits, *Kermarec* v. *Compagnie*, 358 U. S. 625.

If maritime jurisdiction can indeed be extended to shoreside accidents when carrying out ship's business, can there be any less jurisdiction because the Respondent herein was the repairman under contract with the shipowner aboard the vessel to repair her engines. In view of the interplay between the various parties, shipowner, repairman and seaman, to repair the ship to aid in her return to transit and commerce, the sole question to determine jurisdiction should have been whether decedent's accident arose during ship's business, and was related to that business and to the operation of the vessel, *O'Donnell* v. *Great Lakes*, 318 U. S. 36; *Senko* v. *LaCrosse*, 352 U. S. 370; and *Braen* v. *Pfeifer*, 361 U. S. 129.

The decision of this Court in *Calbeck* v. *Travelers*, 370 U. S. 114, held that the Longshoremen & Harbor Workers' Compensation Act, 33 U. S. C. § 901, *et seq.*, was designed to ensure that a remedy existed for injury sustained by an

employee on navigable waters and to avoid any jurisdictional uncertainty arising because of the source of the injury. The Court stated that coverage short of the limits of maritime jurisdiction would defeat the object of Congress to assure a compensation remedy, that the purpose of the Act was to guarantee a remedy wherever possible and permitted jurisdictional coverage for accidents arising on land equal to the outer limits of maritime jurisdiction under the general maritime law. The Court did so by establishing equal boundaries of maritime jurisdiction for seamen and harbor workers in an effort to achieve uniformity in that jurisdiction.

So—the Compensation Act was construed to advance the same uniformity of Admiralty and Maritime jurisdiction in order to assure coverage for as many injured workers as possible under federal acts and laws rather than the state compensation systems, thus assuring equal protection to all classes of workers.

The Court below in *Interlake* v. *Nielsen*, 338 F. 2d 879, permitted Longshoremen and Harbor Workers' Compensation coverage for a shipkeeper who drove his car off the dock, resulting in his death, caused by the impact with ice in navigable waters, holding that the Compensation Act extended to claims for injury or death in navigable waters regardless of origin. More importantly, the relationship of shipkeeper to the vessel and the fact that death occurred during the course of employment in pursuance of ship's business was fully established. Thus the importance of locale of the accident was properly subordinated to the status of the parties in an effort to reach an effective balance in establishing uniform maritime jurisdiction under the Compensation Act and the general maritime law.

The Court below in this matter stated that there would be maritime jurisdiction herein under the Federal Compensation Act, but not under the general maritime law, thus creating an artificial jurisdictional distinction between

harbor workers and seamen, contrary to the efforts of this Court to equally advace the rights of all who follow the calling of the sea, *Seas* v. *Sievacki*, 328 U. S. 85, *Colbeck* v. *Travelers, supra.*

The entire trust of *Calbeck* was to ensure compensation coverage consistent with the limits of maritime jurisdiction in order to effectively afford a compensation remedy to all injured workers. *Calbeck* struck down the uncertainty of previous decisions, involving the "twilight cases", the "maritime but local" cases.

In the *Nielsen* case, *supra,* the Court below interpreted the purpose of the *Calbeck* decision as follows:

> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land" (882).

We now have the impossible situation of legislative and judicial extension of maritime jurisdiction, followed by judicial declaration in *Calbeck* that the federal compensation coverage would keep abreast of the expanded maritime jurisdiction in order to achieve uniformity, now coupled with a holding herein by the Court below that compensation coverage for longshoremen exceeds the boundaries of maritime jurisdiction. Thus—the part has now become greater than the whole, a condition so contrary to reason as the call for this Court to review this matter in an effort to again achieve a basic uniformity and harmony in Admiralty and Maritime jurisdiction as between seamen and harbor workers.

The emasculation of maritime jurisdiction herein may inevitably wither compensation coverage and dilute the effect of *Calbeck* and other cases extending maritime jurisdiction to land accidents occurring during the course of employment.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: April 29, 1965.

Respectfully submitted,

GOLDSTEIN & STERENFELD,
Counsel for Petitioner,
32 Broadway,
New York, New York, 10004.

HARVEY GOLDSTEIN,
on the Petition.

APPENDIX

Opinion of United States District Court, Eastern District of Michigan, Southern Division

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

[SAME TITLE]

Appearances:

VICTOR G. HANSON, Attorney for Plaintiff, 15921 West Seven Mile Road, Detroit 35, Michigan.

LEROY VANDEVEER; Vandeveer, Haggerty, Doelle, Garzia, Tonkin & Kerr, 3250 Guardian Bldg., Detroit 26, Michigan.

This matter is before the court on motion for summary judgment. Initially the plaintiff brought an action for wrongful death against her husband's employer, and it is agreed that the testimony that would be presented to prove the circumstances of his death would follow the testimony in that action. *Wiper* v. *Erie Sand Steamship Co.*, Civil Action No. 8237, United States District Court for the Western District of New York.

What little can be told of the death of the plaintiff's husband is not in controversy, but rather the inferences that may be drawn. The plaintiff's husband was an engineer aboard the S. S. Hydro, a sandsucker operating on the Great Lakes that put in for repairs at the defendant's yard on the Detroit River. The repairs were nearing completion when the plaintiff's husband went ashore, ostensibly to check on a necessary part. He had been drinking when

he left and was wearing his street clothes. It was shortly past 8 o'clock P.M., on September 15, 1958, and the Hydro was scheduled to leave early the following morning. The Captain, who noticed his unsteady condition, urged the plaintiff's husband not to go. In any event, the plaintiff's husband did not return with the part and was not seen again. The Hydro left without him. If the plaintiff's husband left the ship for a last night uptown rather than for the purpose of checking on the necessary part, that is something that must be inferred. Several days later his body was discovered floating where the Hydro had been tied. An autopsy indicated that death had occurred by drowning on September 16, 1958, and the alcoholic content of the blood was determined to be 0.35 per cent.

The plaintiff's contention is that her husband's death by drowning resulted from the defendant's failure to maintain its yard in a safe condition—that the pier to which the Hydro was tied was rough and broken and that the shoreline could not be distinguished in the dark.

Does Michigan law or maritime law govern? The plaintiff has cited many cases to show the expanding nature of maritime law. In none, however, has a person in possession of land providing a berth for a vessel been held responsible under maritime law for the safety of the men going ashore. In the absence of an established rule, Michigan law will be applied. The law of the rights of seamen to recover for injury has been described as a volcano in eruption, and a warning has been issued that so long as it "continues in eruption, no charts are guaranteed reliable." Gilmore and Black, Admiralty 248. It appears that the changes have related to the protection afforded seamen at the expense of ship owners. The court is not aware of any lessening of the burden of proof in maritime law generally.

Though it might be argued that the defendant had a duty to maintain its yard in a safe condition, see *Garstka* v. *Re-*

public Steel Corp., 294 Misc. 387, 392, 293 N. W. 691, 692, the plaintiff must still establish a connection between any negligence of the defendant and the death of her husband. The existence of a casual connection may not be left to conjecture. In *Kaminski* v. *Grand Trunk Western R. R.*, 347 Misc. 417, 422, 79 N. W. 2d 899, 901-02, the Michigan Supreme Court adopted the following standard for proof of casual connection:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deductible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective-application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridicial basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."

Clearly, the cause of the death is left to conjecture here. The plaintiff's husband might have had so much to drink that he could not climb the vessel's ladder; the ladder itself might have been displaced by the vessel's roll, as the plaintiff suggested in the action against Erie Sand Steamship Company; or the plaintiff's husband might have tripped over a rough part of the pier. The testimony that would be presented would not point to any one explanation selectively.

Since casual connection cannot be proved by sufficient evidence, the defendant's motion for summary judgment will be granted.

FRED W. KAESS,
United States District Judge.

Dated: May 7, 1963.

Opinion of United States Court of Appeals for the Sixth Circuit

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15467

ELSIE C. WIPER, Executrix,

Plaintiff-Appellant,

v.

GREAT LAKES ENGINEERING WORKS,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Decided January 29, 1965.

Before: MILLER and EDWARDS, Circuit Judges, BROOKS, District Judge.

BROOKS, District Judge. This appeal is from a summary judgment entered in this the second action brought by the Plaintiff-Appellant Elsie C. Wiper, Executrix of the estate of Joseph W. Wiper, deceased, to recover damages for the death of her husband who was an engineer aboard the vessel S. S. Hydro. The first action was brought pursuant to the Jones Act, 46 U. S. C. Section 688, and resulted in a jury verdict for Erie Sand Steamship Co., the owner of the vessel. The judgment was affirmed on appeal. *Wiper*

v. *Erie Sand Steamship Co.*, 293 F. 2d 491 (2nd Cir. 1961). The present action is based on diversity of citizenship and amount in controversy and is against the Great Lakes Engineering Works, Defendant-Appellee (hereafter Great Lakes), the owner of the dock at which the Hydro was tied at the time the decedent disappeared.

It was stipulated that the testimony in the prior case would be considered on the motion for summary judgment and the few known circumstances surrounding the death of the decedent are not in dispute. He was a member of the crew of the Hydro, a sandsucker operating in the Great Lakes that put in for repairs at the yard of Great Lakes. During the afternoon of September 15, between 4:00 and 5:00 o'clock, the Marine Superintendent of Erie Sand Steamship Company talked with Wiper and, noticing that he had been drinking, suggested he get some sleep. Later that evening, about 8 o'clock, a seaman awakened Wiper to tell him that the Great Lakes employees were looking for an oil seal. Wiper said he would go ashore to the machine shop and check on the missing part. He dressed in street clothes and as he was leaving he met the captain of the Hydro who, smelling alcohol on Wiper's breath, asked him to go back to bed. Wiper disregarded this request, went down the ladder and was next seen on the roadway which led to the machine shop and also to the town of River Rouge, which was about one mile away. A crewman who saw Wiper on the roadway was the last witness who saw Wiper alive. He said Wiper "could walk O.K." The following morning the Hydro sailed without Wiper and three days later his body was recovered in the slip. An autopsy was performed and the cause of death was found to be asphyxia by drowning. The autopsy also disclosed Wiper's blood alcohol content to be .35%. An expert witness testified that a person with a .35% of blood alcohol content would be "somewhere between a very sleepy and stuporous state and complete coma."

The complaint alleges that Great Lakes failed to provide a safe docking area for the Hydro and as result of such negligence the decedent was "caused to fall from such dock into the water, thereby resulting in his death by drowning." Negligence in the maintenance of the dock was not denied by Great Lakes for the purpose of consideration of its motion for summary judgment.

The plaintiff first contends that the motion was erroneously granted because of the application of the law of Michigan rather than maritime law in determining as a matter of law that because of a complete lack of evidence no factual issue of proximate cause existed between the negligent maintenance of the dock and the death of the decedent. It was on this basis alone that the motion for summary judgment was granted, the District Court holding that the plaintiff must establish a connection between any negligence of Great Lakes and the death of her husband and that existence of a causal connection may not be left to conjecture, quoting from *Kaminski* v. *Great Trunk Western R. R.*, 347 Mich. 417, 422, 79 N. W. 2d 899, 901-02, where the Michigan Supreme Court adopted the following standard for proof of causal connection:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deductible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a judicial basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."

Since the record is completely devoid of any evidence as to how Wiper met his death and since it could have resulted from many causes equally as probable as the one relied upon by plaintiff, its causation is pure conjecture and the motion for summary judgment was properly sustained, under Michigan law. *General Motors Corporation* v. *Wolverine Insurance Co.*, 255 F. 2d 8 (6th Cir. 1958); *Sheptur* v. *Procter & Gamble Distributing Co.*, 261 F. 2d 221 (6th Cir. 1958), cert. denied, 359 U. S. 1003; *Kaminski* v. *Grand Trunk Western R. R. Co., supra; Poledna* v. *Bendix Aviation Corporation*, 360 Mich. 219, 106 N. W. 2d 789; *Bryant* v. *Athans*, 362 Mich. 17, 106 N. W. 2d 386; *Walsh* v. *Grand Trunk R. R. Co.*, 363 Mich. 522, 110 N. W. 2d 799.

The plaintiff, however, asserts it was error to apply the Michigan standard of causal connection to the facts of this case. She argues it was a maritime tort that caused the death of her husband and since the Michigan Wrongful Death Act, Ch. 691, 581, Sect. 1 of the Judicature Act, permits a cause of action under the same principles which would have been available to decedent had he only been injured, the proper standard of causal connection is that followed in cases involving maritime torts. And it does appear that if the maritime standard of causation had been applied here the District Court might not have directed a verdict since even when conjectural such issue is generally left to the jury. See *Lavender* v. *Kurn*, 327 U. S. 645 (1945). *Myers* v. *Reading Co.*, 331 U. S. 469 (1947). *Schulz* v. *Pennsylvania R. R. Co.*, 350 U. S. 523 (1956); *Stone* v. *New York, C. & St. L. R. R. Co.*, 344 U. S. 407 (1952); and *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500 (1956), and see also *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325 (1960), applying the same standard to a claim of negligence under the Jones Act and to a claim of unseaworthiness under the general maritime law.

Plaintiff's contention, however, that maritime law is applicable must be rejected for it is well-settled that absent a maritime status between the parties the traditional test of locality of the tort governs the question of whether maritime or state law is applicable. *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953); *London Guaranty & Accident Co.* v. *Industrial Accident Co.*, 279 U. S. 109 (1928); *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263 (1921); *Martin* v. *West*, 222 U. S. 191 (1911); Hughes, Admiralty (2nd Ed.) Sec. 96. Thus where the tort occurred in navigable waters the maritime law is applicable, *Atlantic Transport Co.* v. *Imbruvek*, 234 U. S. 52, 61 (1913); In re *Garnett*, 141 U. S. 1 (1890); *New England Mutual Ins. Co.* v. *Dunham*, 11 Wall. (U. S.) 1 (1870); The Eagle, 8 Wall. (U. S.) 15 (1868), but where it occurred on land the state law is applicable. *Crowell* v. *Benson*, 285 U. S. 22 (1931); *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 41 (1942). Under the allegations of the complaint, defendant's negligently kept dock resulted in decedent's death by drowning in navigable waters, and therefore plaintiff contends that the tort should be deemed to have occurred in navigable water. However, docks and wharves are considered as extensions of land, *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82 (4th Cir. 1959); *Netherlands American Steam Nav. Co.* v. *Gallagher*, 282 F. 2d 171 (2nd Cir. 1960); The Plymouth, 70 U. S. (3 Wall.) 20 (1865); Hughes, Admiralty (2d Ed.) Sec. 198; 2 Am. Jur. 741, 767-768, Admiralty Sec. 84, and therefore the negligently maintained dock which presumably caused the decedent to fall was land, and the decedent was on land at the time he was caused to fall. Thus, the tort was complete before decedent ever touched the water and this being true, the subsequent drowning is significant not to determine the maritime or non-maritime nature of this action but only as it relates to damages, *Cleveland Terminal and Valley R. R. Co.* v. *Cleveland*

Steamship Co., 208 U. S. 316 (1908); The Plymouth, 70 U. S. (3 Wall.) 20 (1865).

The very recent opinion in *Interlake Steamship Co.* v. *Nielsen*, 338 F. 2d 879 (6th Cir. 1964), where a shipkeeper in the course of his employment drove his car off the dock where his ship was berthed and was killed by his impact on the ice in navigable waters is distinguishable from the present case. There the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 903 (a), was held to extend to a claim for injury or death when the situs of the injury or death was in navigable waters regardless of whether the cause had a land-based origin. In the present case it is the locality of the tort that governs the question of whether maritime or state law is applicable rather than the locality where the injuries or death occurred which, as held by *Interlake*, determines coverage under the Longshoremen's and Harbor Workers' Compensation Act. For these reasons then, there is no merit to plaintiff's claim that the tort here in question occurred in navigable waters.

Finally the plaintiff seeks to invoke maritime jurisdiction under the Jones Act by arguing that Wiper, although not employed by Great Lakes, was under its direction and was a borrowed servant in the repairing of the HYDRO as shown by his leaving the ship to procure the oil seal. This issue of "borrowed servant" was not raised in the District Court and should not be considered here. *Helvering, Commissioner of Internal Revenue* v. *Wood*, 309 U. S. 344, 348-349 (1940); *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U. S. 334, 342, footnote 7 (1959); *Redford* v. *Eastern Coal Corp.*, 260 F. 2d 447, 457 (6th Cir. 1958), cert. denied, 359 U. S. 958 (1959); *City of Erlanger* v. *Berkemeyer*, 207 F. 2d 832, 839 (6th Cir. 1953); *Allstate Insurance Co.* v. *Springer*, 269 F. 2d 805, 811 (6th Cir. 1959). However, even if considered,

the argument must be rejected as being without merit. If Wiper could be considered a borrowed servant of Great Lakes, a land-based operation for repairing vessels, then decedent's executrix's only remedy to recover damages would be resort to state law, as the tort that caused his death occurred on land, and Wiper as a borrowed servant of Great Lakes could not be acting in the course of his employment as a seaman, and only a seaman acting within the course of his employment is within the protection of the Jones Act. *Swanson* v. *Marra Bros.*, 328 U. S. 1, 7 (1945); *Frankel* v. *Bethlehem-Fairfield Shipyard*, 46 F. Supp. 242, 249, affirmed 132 F. 2d 634 (4th Cir. 1942), cert. denied, 319 U. S. 746 (1942).

The Judgment of the District Court is affirmed.

Judgment of United States District Court, Eastern District of Michigan, Southern Division

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

[SAME TITLE]

At a session of said court, held in the Federal Building at the City of Detroit, Michigan, on the 9th day of May, A. D. 1963.

Present:

HONORABLE FRED W. KAESS,
District Judge.

The above cause came on to be heard on defendant's motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and the Court having entered an Order granting said motion of May 7, 1963, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by her action, and that said action be, and the same is, hereby dismissed on the merits.

FRED W. KAESS,
United States District Judge.

A true copy.

JOHN J. GINTHER,
Clerk.

By M. McKEOWN,
Deputy Clerk.

Judgment of Affirmance of United States Court of Appeals for the Sixth Circuit

(Filed January 29, 1965)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15,467

ELSIE C. WIPER, Executrix of the Estate of Joseph W. Wiper, Deceased,
Plaintiff-Appellant,

vs.

GREAT LAKES ENGINEERING WORKS,
Defendant-Appellee.

Before:

MILLER and EDWARDS, *Circuit Judges,* and BROOKS, *District Judge.*

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Judgment of Affirmance of United States Court of Appeals for the Sixth Circuit

IT IS FURTHER ORDERED that defendant-appellee recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

s/ CARL W. REUSS,
Clerk.

A True Copy.

Attest:

.....
CARL W. REUSS, Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 291

ELSIE C. WIPER, Executrix of the Estate of
Joseph W. Wiper, Deceased,
Petitioner,
vs.
GREAT LAKES ENGINEERING WORKS,
a Michigan corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF OF GREAT LAKES ENGINEERING WORKS, A MICHIGAN CORPORATION, IN OPPOSITION

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SUBJECT INDEX

	Page
Opinions Below	1-2
Jurisdiction	2
Statutes and Rules Involved	2
Question Presented	2
Statement	2-6
Argument—Does the opinion of the Court of Appeals create any lack of uniformity with the opinions of this Court or other Federal Courts relating to the boundaries of admiralty and maritime jurisdiction?	6-8
Conclusion	9

INDEX TO AUTHORITIES CITED

Kermarec v. Compagnie Generale Transatlantique, (1959), 358 U.S. 625	7, 8
Weinstein v. Eastern Airlines, Inc. (3 Cir. 1963), 316 F2d 758, cert. den. 375 U.S. 940	8
Wiper v. Erie Sand Steamship Co. (2 Cir. 1961) 293 F. 2d 491	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1112

ELSIE C. WIPER, Executrix of the Estate of
Joseph W. Wiper, Deceased,
Petitioner,
vs.
GREAT LAKES ENGINEERING WORKS,
a Michigan corporation,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
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THE SIXTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 340 F. 2d 727, and is printed on pages 12-18 of petitioner's

brief and appendix. The opinion of the District Court is unreported, but is printed on pages 9-11 of petitioner's brief and appendix.

JURISDICTION

The opinion of the Court of Appeals was filed January 29, 1965. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

None.

QUESTION PRESENTED

Does the opinion of the Court of Appeals create any lack of uniformity with the opinions of this Court or other Federal Courts relating to the boundaries of admiralty and maritime jurisdiction?

STATEMENT

This lawsuit was begun by a civil complaint filed in the United States District Court for the Eastern District of Michigan, alleging a cause of action for the wrongful death of petitioner's decedent, Joseph W. Wiper, a seaman employed on the Erie Sand Steamship Company's vessel, SS HYDRO. The respondent, Great Lakes Engineering

Works (hereinafter referred to as "Great Lakes") is the owner of a dock at which the HYDRO was tied at the time of Mr. Wiper's death. Jurisdiction was based on Title 28 U.S.C. §1332, there being allegations of diversity of citizenship and an amount in controversy exceeding $10,000.00.

An earlier lawsuit had been filed in the United States District Court for the Western District of New York on behalf of Wiper's Estate against the Erie Sand Steamship Co., based upon the Jones Act, Title 46 U.S.C. §688. That action was tried beginning March 22, 1960, and resulted in a verdict and judgment for the defendant. The Court of Appeals for the Second Circuit affirmed. *Wiper v. Erie Sand Steamship Co.*, (2 Cir. 1961) 293 F. 2d 491. The testimony in the Jones Act trial disclosed the circumstances which are known concerning Mr. Wiper's death.

Following the affirmance of the Jones Act judgment for defendant by the Second Circuit, the respondent in the present case moved for summary judgment, and it was stipulated at the time of oral argument on the motion that the transcript of the Jones Act trial could be considered an exhibit to the motion, and that the testimony in the present case as to the circumstances of Wiper's death would follow that introduced in the earlier case.

Great Lakes' motion was based on the premise that no genuine issue of fact existed and it was entitled to judgment as a matter of law, inasmuch as the evidence was insufficient as a matter of law to support a finding that Great Lakes' alleged negligence proximately caused Wiper's death.

U. S. District Judge Fred W. Kaess, who heard the motion, agreed with this contention and entered a judgment in Great Lakes' favor, from which an appeal was taken.

The transcript which became an exhibit to Great Lakes' motion contains testimony that the HYDRO was taken to Great Lakes' facilities near Detroit, Michigan, on September 9, 1958, because of propulsion trouble (227, 228).[1] On or about September 11, 1958, the vessel was moved into Great Lakes' No. 1 slip, where she remained until the repairs were completed. The dock to which the HYDRO was tied was composed of sand, stone and cinders (234).

About 40 to 75 feet from the place where the HYDRO was berthed, a roadway ran up the dock towards the Great Lakes machine shop (241, 336). The same roadway continued on into the town of River Rouge, Michigan, less than a mile away (351). It was not unusual for the HYDRO's crew to go into River Rouge at night for recreation while she was tied to the Great Lakes dock (261, 263-264). However, the other crewmen were evidently able to make their way safely to and from the ship, because Wiper was the only crew member who was lost (79).

During the afternoon of September 15, about 4 or 5 o'clock, George D. Griswold, the Marine Superintendent of Erie Sand Steamship Co., talked with Wiper on the vessel and noticed that he had been drinking (343, 344). Griswold suggested that Wiper get some sleep, and apparently Wiper heeded this advice because at about 8:00 p.m. that evening a seaman, John McLaughlin, awakened Wiper in his room to tell him that the Great Lakes employees were looking for an oil seal (33, 34). Wiper said he would go over to the shop and check on the missing part, and then dressed in street clothes (33, 101, 114). The record does

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[1] Figures in parentheses refer to pages in transcript admitted as exhibit to Great Lakes' motion for summary judgment.

not support petitioner's assertion that Wiper was "ordered" by respondent's mechanic to go to the shop for the oil seal.

The captain of the HYDRO, Millard S. Brewer, came aboard the vessel at about 8:30 p.m. that evening and met Wiper on the deck (242). They conversed briefly and Captain Brewer noticed the smell of alcohol on Wiper's breath and a heaviness in his speech. He asked Wiper to go back to bed, but instead Wiper went down the ladder to the dock and started up toward the roadway (243, 244). The Captain stated that at that time Wiper "could walk O.K." (254).

Another crewman, Willis Campbell, was returning to the HYDRO at about 8:30 p.m., and he passed Wiper on the roadway which led to the machine shop and to the town of River Rouge (336, 337). Wiper walked alright then, as far as Campbell could remember (338). Wiper did not return with the oil seal and about 11:00 p.m. that evening Great Lakes' master mechanic obtained the seal and brought it to the vessel (308).

The HYDRO sailed the following morning, and three days later, on September 19, 1958, Wiper's body was recovered in the slip. An autopsy was performed by the Wayne County Medical Examiner, who found the cause of death to be asphyxia by drowning (213). He also found Wiper's blood alcohol content to be .35%. An expert witness, Dr. Vincent Scanurra, testified that a person with .35% of blood alcohol content would tend to be stuporous or approaching a completely comatose state (214, 215). He testified further that from .25% up, a person would need assistance in simple acts such as dressing and walking, and he would not behave in a normal fashion (217). Dr. Scanurra concluded that despite the admitted differences

in alcoholic tolerance of individuals, the decedent would have been "somewhere between a very sleepy and stuporous state and complete coma at .35%" (220).

Evidence in the Jones Act trial relating to the condition of the dock was contradictory, but no attempt is being made to state the evidence favorable to Great Lakes, since the motion for summary judgment, being addressed only to the matter of proximate cause, in effect admitted the allegations of negligence in the complaint, for purposes of the motion.

Following the submission of briefs and the hearing of oral arguments, the Court of Appeals affirmed the Judgment of the District Court in favor of the respondent.

ARGUMENT

DOES THE OPINION OF THE COURT OF APPEALS CREATE ANY LACK OF UNIFORMITY WITH THE OPINIONS OF THIS COURT OR OTHER FEDERAL COURTS RELATING TO THE BOUNDARIES OF ADMIRALTY AND MARITIME JURISDICTION?

The Court of Appeals held in this case that (1) in the absence of a maritime status or relationship, the test of locality determines whether a tort action is maritime or non-maritime; (2) there was no maritime status or relationship between petitioner's decedent and Great Lakes; (3) the tort alleged in petitioner's Complaint occurred, if at all, upon land within the State of Michigan, and is therefore governed by the law of Michigan; and (4) under Michigan law, there was not sufficient evidence to submit to the jury the question of whether Great Lakes' alleged negligence proximately caused the death of petitioner's decedent.

In arguing that the court below erred, petitioner cites authorities demonstrating that a maritime character has been found to exist with respect to certain injuries occurring on land. These include actions by seamen under the Jones Act, 46 U.S.C. §688, and for maintenance and cure; and actions by longshoremen under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950, and upon the theory that a shipowner with whom they had a maritime relation had breached a warranty of seaworthiness.

Obviously, however, these cases do not conflict with the opinion below, because in each of them the existence of maritime jurisdiction for injuries occurring on land rested upon either interpretation of a statute or breach of a duty arising out of a maritime status or relation.

The first category is not applicable here because as petitioner candidly admits, "There are no statutes involved herein."

Notwithstanding petitioner's argument to the contrary, it is equally apparent that no maritime status or relation existed between Wiper and Great Lakes. To support the position that such a status or relation did exist, petitioner mistakenly relies on *Kermarec v. Compagine Generale Transatlantique,* (1959) 358 U.S. 625. *Kermarec* merely held that an injury to a visitor aboard a vessel involved a maritime tort. The tort was held to be maritime because of its locality, having occurred on navigable waters.

In the present case, decedent Wiper's maritime status or relation was that arising out of his employment by the vessel owner, the Erie Sand Steamship Company. But Great Lakes was a stranger to this relation and its only duty toward Wiper was that of a possessor of land toward one who is authorized to go upon the land. Great Lakes

owed no duty to Wiper arising out of a maritime contract of employment. Consequently, as between Great Lakes and Wiper, the test of whether the alleged tort was maritime or not was the traditional test of locality. For this reason, the cases upon which petitioner relies, in which admiralty jurisdiction was found to exist regardless of locality, because they arose out of a maritime status, are not authoritative in this case.

Petitioner's counsel contends that the opinion of the appellate court creates a conflict regarding the boundaries of admiralty jurisdiction for seamen as opposed to harbor workers. But the court was not attempting to adjudicate the rights of anyone based upon his status as a seaman or harbor worker. Petitioner's error is in injecting any "seaman" or "harbor worker" or "scope of employment" concepts into this case when they are clearly irrelevant.

In view of the holding by the District Court and the Court of Appeals that no maritime status existed between Wiper and Great Lakes, the fact that Wiper had been a seaman was insignificant. Without a maritime status being involved, admiralty jurisdiction depended strictly upon locality of the alleged tort, regardless of whether Wiper was a seaman or one who had never before left dry land. *Kermarec v. Compagnie Generale Transatlantique, (supra)* 358 U.S. 625; *Weinstein v. Eastern Airlines, Inc.,* (3 Cir. 1963) 316 F2d 758, *cert. den.* 375 U.S. 940.

The opinion below merely involved an application of the time-honored locality test, resulting in a holding that the tort alleged was non-maritime. It was not based on any statute relating to seamen or harbor workers, and it will have no bearing whatever on the scope of admiralty jurisdiction in other cases which are properly based upon a status as seaman or harbor worker. The conflict which petitioner perceives is wholly imaginary.

CONCLUSION

This is not a proper case for granting certiorari because (1) there are not "special and important reasons therefor" within the guide-lines stated in Rule 19 of the Supreme Court Rules, and (2) the Court of Appeals correctly decided this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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May 25, 1965.

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Supreme Court of the United States

October Term, 1964

No. [redacted] 91[redacted]

ELSIE C. WIPER, executrix of the Estate of JOSEPH W. WIPER, deceased,

Petitioner,

against

GREAT LAKES ENGINEERING WORKS,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

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No. 1112

ELSIE C. WIPER, executrix of the Estate of JOSEPH W. WIPER, deceased,

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REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

That Joseph Wiper, Chief Engineer, was subject to the orders of the Respondent's employees, working aboard the vessel was obvious. Wiper was indeed directed to find a part of the ship's propulsion system and went ashore in obedience to that order. John McLoughlin, an oiler, testified as follows, at pages 33 and 34:

> "Q. The evening of September 15th after you went on watch, did you have occasion to see or observe Mr. Wiper, the first assistant engineer? A. Yes, sir, I did.
>
> Q. Approximately when was that that you first saw him after you came on watch? A. That was around 8 o'clock.
>
> Q. Where was he at the time you observed him? A. He was in his room.
>
> Q. Did you go into his room? A. Yes, I did, I went in and woke him up.
>
> Q. What did you wake him up for? A. There was a part missing for the thrust bearing and the shipyard's man asked me to contact him and find

out where it was at. They were putting it together. He said he would go over in the shop and check on it.

Q. Was he dressed at the time you first went into his room? A. No, he was asleep.

Q. You had to wake him up? A. Yes.

Q. Was this part needed immediately? A. To put the thrust together, yes.

Q. The maintenance crew had asked you to get this part, is that correct? A. Yes."

Respondent, in its brief, sought to apply the "status" test only to the deceased and the Respondent, ignoring the obvious relationship of the deceased seaman to his ship.[1] As such, Respondent has misunderstood the decision of this Court in *Gutierrez* v. *Waterman,* 373 U. S. 206, in which the injured longshoreman sought relief against the shipowner under the general maritime law for an injury on the dock, predicated not upon the employment relationship of the parties but because of the status created between the worker and the ship, in furthering ship's business and contributing to its function as a vessel.

The relationship of the deceased to the ship cannot be diminished by the deceased's employment status with the vessel owner and the fact that the Respondent was an independent contractor furthering the function of the vessel. Respondent was contracted by the shipowner and was aboard the ship to return it to a seaworthy condition. Wiper was called upon to aid the Respondent in that service to the vessel and died while in that course.[2] The status thus

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[1] By reason of both employment aboard the vessel and the nature of his duties at the time of his death, which was contributing to the accomplishment of Respondent's mission to the function of the vessel, to its operation and welfare and to the advancement of ship's business.

[2] Proof of intoxication was less than absolute in view of expert testimony that alcohol continued to absorb into the blood stream after death (215), making it impossible to ascertain the alcohol content in the blood at the time of death.

created vis-à-vis Wiper, the Respondent and the vessel, established maritime jurisdiction to determine the responsibilities of the parties and cannot be negated by the requirement of an employment relationship.

The decision by the Court below was thus totally inconsistent with legislative and judicial efforts to expand the maritime jurisdiction so as to afford injured workers in maritime industries an opportunity to use the more liberal benefits of the Maritime and Admiralty jurisdiction to obtain compensation coverage or awards under the general maritime law, the Jones Act, 46 U. S. C. § 688, or by way of maintenance and cure, as the case might be, *Calbeck* v. *Travelers,* 370 U. S. 114; *Gutierrez* v. *Waterman,* 373 U. S. 206; *O'Donnell* v. *Great Lakes,* 318 U. S. 36, and *Aguilar* v. *Standard,* 318 U. S. 724.

The decision by the Court below was a negation of the effect of *Calbeck* and of its own decision in *Interlake* v. *Nielsen,* 338 F. 2d 879 (6C), in confining maritime jurisdictional boundaries to the "navigable waters" or "locale" test, a totally inconsistent position with the more recent decisions of this Court, above cited.

As such, this matter should be reviewed by this Honorable Court in an effort to once again establish definitive, uniform boundaries of maritime jurisdiction for all who would labor in the maritime industries, advancing ships' business.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: July 1, 1965.

Respectfully submitted,

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